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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DONALD PAUL LAWSON, Defendant and Appellant.	A123063 (Contra Costa County Super. Ct. No. 050802504)

I. INTRODUCTION

Donald Paul Lawson appeals from his conviction following a jury trial of petty theft with a prior theft conviction in violation of Penal Code sections 484 and 666.[1] Appellant contends that: (1) the evidence was insufficient to support his conviction; (2) the trial court erred in informing the jury of appellant's prior convictions; (3) the trial court erred in admitting evidence of alleged prior thefts on the issue of intent; (4) the prosecutor committed misconduct; and (5) cumulative error. We will affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

On February 29, 2008, the Contra Costa County District Attorney filed an information charging appellant with committing petty theft with a prior theft conviction with allegations of nine prior theft convictions (§§ 484, 666). The information also charged appellant with violating probation (§ 1203.3) and with being presumptively ineligible for probation because of two prior felony convictions (§ 1203, subd. (e)(4)).

[1] All further unspecified statutory references are to the Penal Code.

On August 19, 2008, appellant waived his right to a jury trial on the issue of his prior theft conviction and stipulated that he sustained such conviction, and the jury trial commenced.

A. *Facts Relating to the Charged Offense*

1. *Prosecution Case*

On November 4, 2007, Paolo Subida was working as a loss prevention officer at the Safeway grocery store on Bancroft Road in Walnut Creek. At around 1:00 p.m., Subida was monitoring the store's closed circuit cameras and saw appellant enter the store with an empty plastic Safeway bag. Appellant was about six feet tall and weighed between 185 and 195 pounds.

According to Subida, appellant got a shopping cart in the deli department. Then, after lingering for a few minutes looking nervous, appellant selected a quantity of fresh olives and put them into a container which was available for this purpose in the deli. Appellant then proceeded to the beer aisle, where he selected an 18-pack and a 30-pack of Budweiser and put them into the shopping cart. Appellant then pushed the cart to the store's check-out area and parked the cart behind a closed express check-out lane. After walking to the front of the store and selecting a bag of ice, he returned to his cart with the bag of ice, grabbed an additional plastic bag from the cashier area and put both items into the cart.

A cashier opened the register nearest to appellant and called him over in order to check-out, but appellant turned his cart around and moved to an area of the store near the deli and a Starbucks stand. At this time, Subida called James Johnson, another loss prevention officer, by cell phone and instructed him to come to the closed circuit camera room. After Johnson arrived, Subida went to the floor of the store and proceeded to appellant's location near the Starbucks stand.

When Subida arrived at the Starbucks stand, he observed appellant waiting in line behind a man who was being served. After pulling out his wallet and fumbling through it, appellant closed the wallet and immediately proceeded out the nearest store exit with his cart. Having never observed appellant pay for the items in the cart, Subida contacted

Johnson in the camera room, asked Johnson to join him, and then followed appellant out of the store. Once outside, Subida observed appellant put the bag of ice and the olives into plastic bags.

Subida approached appellant, identified himself, and asked appellant to come back into the store because he had been observed on camera not having paid for any of his items. When appellant responded that he had paid for the items, Subida asked to see a receipt. Appellant pulled out a one hundred dollar bill and said he would not steal because he had money. He then walked away from Subida and Johnson to a brown pick-up truck parked nearby. A man with a shaved head, later identified as Jose Canas, was sitting in the passenger seat.

Subida followed appellant to the truck and repeated that appellant should either produce a receipt or return to the store. Appellant became upset and began yelling and cursing at Subida and Johnson, while at the same time, reaching into the truck to open the door. Fearing for both his own and Johnson's safety, Subida backed away. Appellant got into the truck and drove away. Subida recorded the license plate number and called the police.

Walnut Creek Police Officer Randy Dickey arrived at Safeway about five to ten minutes later and watched the surveillance video. Subida provided details about what he had observed, including a description of appellant and the truck's license plate number. Dickey ran the license plate number and determined that it belonged to a 1987 pick-up truck registered to appellant at an address on Oak Grove Road in Concord. Oak Grove Road was a few miles from the Safeway store. Dickey took custody of the surveillance video.

Later that day, Dickey returned with a photo lineup of six photographs, including one of appellant. Subida identified appellant as the man who took the groceries. Subida later determined the value of the groceries appellant took from the store to be $56.40.

2. *Appellant's Defense*

Appellant's friend, Jose Canas, testified that he went with appellant to the Safeway store in Walnut Creek on November 4, 2007. Canas said appellant was on the phone

when they arrived, so he went into the store alone and put "some chips, some peanuts, couple other things," including beer and ice, into a shopping cart. He paid for the items and the clerk bagged everything except the ice which he picked up when he went to the front door.

While Canas was paying for the items, appellant came up to him and said he was going to get a cup of coffee. When Canas subsequently met appellant at the Starbucks counter, he told appellant that he was going to use the restroom and that he would meet appellant at the truck. Canas left the cart with appellant. A couple of minutes after Canas returned to the truck, appellant arrived and proceeded to pass the items in the cart to Canas through the sliding back window on the back of the cab. After the items were loaded, they drove away. Although Canas observed two men exchange words with appellant near the store, the men never approached or spoke to appellant when he was near the truck.

Canas acknowledged that he had a theft-related conviction in 2002.

B. *Prior Theft Offenses*

1. *Fry's Electronics Theft in 2005*

Concord Police Officer Chris Loercher testified that at about 7:15 p.m. on February 18, 2005, he responded to a reported theft at Fry's Electronics in Concord. He spoke with Fry's loss prevention officer and then contacted appellant in the loss prevention office. Loercher searched appellant and found an empty portable DVD player box in the right sleeve of appellant's jacket. Loercher also found a razor knife, the knife's packaging, and a set of car keys in appellant's jacket pocket.

Loercher located appellant's car and saw, in plain view, a portable DVD player inside the car that could have been packaged in the empty DVD box found in appellant's sleeve. Loercher used appellant's keys to open the car. Inside, he found a second portable DVD player wrapped in bubble wrap. Loercher arrested appellant for burglary and grand theft.

While seated in the back of Loercher's patrol car, appellant told him that "he had a problem with stealing, and . . . he would rather steal a beer than pay a dollar for it."

2. *Albertson's Theft in 2006*

Giovanni Baldizon, a former loss prevention officer for Albertson's grocery store in Concord, testified that, at about 6:00 p.m. on April 28, 2006, he detained appellant for theft. Although he did not remember the details of the incident at trial, he wrote a three-page report of the encounter 15 minutes after it occurred in accordance with Albertson's policy, and he believed that what he wrote in the report was an accurate record of what happened.

The prosecutor read into the record the relevant parts of Baldizon's incident report: "I, loss prevention officer [LPO], Giovanni B., observed a Hispanic male adult by the name of Donald Paul Lawson . . . entering the store and walking toward aisle 22, liquor, where he then took two bags out of his right jacket pocket and made one selection of one Budweiser 18 pack and placed them [sic] in one bag. [¶] He then grabbed the bag[s] of Cheetos, Doritos and Bugles and placed them in another bag. [¶] Donald proceeded to aisle number 15, deli, where he selected one De La Casa dip and one beef jerky and put them inside the bag. [¶] Once items were selected and sealed, Donald made his way to the exit doors by the produce side. Donald failed to pay. He passed all the checkstands. [¶] Suspect exited the doors. I, LPO Giovanni B., stopped suspect and identified myself as store security. Donald was detained and brought upstairs to loss prevention office. Police were noti[fied]."

Baldizon testified that appellant signed the form admitting that he took the items.

On August 22, 2008, the jury found appellant guilty as charged. The court then sustained the charged probation allegation.

On September 22, 2008, the trial court sentenced appellant to the middle term of two years in state prison for his conviction of petty theft with a prior conviction. The court also imposed a previously suspended three-year concurrent term on the probation violation.

Appellant filed a timely notice of appeal on September 24, 2008.

III. DISCUSSION

A. *Sufficiency of the Evidence to Support the Conviction of Petty Theft with a Prior*

Appellant contends there was insufficient evidence to support the jury's finding that he suffered a prior theft-related conviction for purposes of the petty theft with a prior theft conviction charge. He argues that neither his stipulation to having sustained a prior theft-related conviction, nor any evidence regarding a prior theft-related conviction, was ever presented to the jury during trial. Thus, he contends, there was no evidentiary basis upon which the jury could find that he had sustained a previous theft-related conviction.

1. *Background*

At the preliminary hearing, appellant was held to answer on the charge of petty theft (§ 484) from Safeway. The prosecution established the additional section 666 allegation by certified copies of appellant's prior theft-related convictions on February 8, 1999, and September 23, 1999.

At a pretrial hearing for the first trial,[2] appellant waived his right to a jury trial on the 1999 prior theft-related convictions and stipulated that he suffered those prior convictions.

At a pretrial hearing for the second trial, defense counsel argued the court should not give CALCRIM No. 1850[3] because appellant had already stipulated to the 1999 theft

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[2] A mistrial was declared during a hearing outside the presence of the jury at the first trial after Mr. Canas was seen talking to jurors outside the courtroom.

[3] CALCRIM No. 1850 provides: "If you find the defendant guilty of petty theft, you must then decide whether the People have proved the additional allegation that the defendant has been convicted of a theft offense before and served a term in a penal institution as a result of that conviction. It has already been determined that the defendant is the person named in exhibits ___ <insert numbers or descriptions of exhibits>. You must decide whether the evidence proves that the defendant was previously convicted of the alleged crime[s]. To prove this allegation, the People must prove that: [¶] 1. The defendant was previously convicted of a theft offense; AND [¶] 2. The defendant served a term in a penal institution for that conviction. [¶] The People allege that the defendant was previously convicted of: [¶] [1] A violation of __<insert code section violated>, on __, <insert date of conviction>, in the __ <insert name of court>, in Case Number __ <insert docket or case number>."

convictions for purposes of the enhanced sentence under section 666. With respect to those convictions, defense counsel asserted they "shouldn't be discussed unless the court admits them as otherwise relevant." The court asked appellant if he still waived jury trial on the 1999 convictions and if "there was and continues to be an admission of the prior theft offense." Appellant responded in the affirmative and his counsel concurred. The court stated that it would modify CALCRIM No. 1850 accordingly.

At trial, after the parties rested and prior to argument, the court instructed the jury, in relevant part: "During the trial, you were told that the People and the defense agreed or stipulated to certain facts. This means that they both accept those facts are true. Because there is no dispute about those facts, you must accept them as true. [¶] And the fact that was stipulated to in this case was that Mr. Lawson had a prior conviction for a theft related offense for which he served time in a penal institution."

In closing, defense counsel argued: "This is a man who's not afraid to take responsibility. Yes. He has . . . a blemished past to say the least, which is why I asked all of you if that is going to be so distracting to you, because I knew that this case would turn into the case of the scarlet letter. [¶] Mr. Lawson can't escape that. He is going to be penalized over and over and over for what he's already admitted to and served time in a penal institution for."

2. *Analysis*

Appellant was charged with theft pursuant to section 484. In addition, the information alleged a prior conviction pursuant to section 666. Section 666 provides, in relevant part: "Every person who, having been convicted of petty theft, . . . and having served a term therefor in any penal institution . . . is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison."

In *People v. Bouzas* (1991) 53 Cal.3d 467 (*Bouzas*), the defendant was charged with petty theft with a prior theft-related conviction pursuant to section 666. The trial court denied his request to stipulate to the prior conviction to preclude the jury from learning about his felony robbery prior conviction. The trial court permitted the

prosecution to prove the prior conviction in open court based on its assumption that the prior conviction was an element of the offense. (*Id*. at p. 470.) The jury convicted the defendant of the section 666 charge, and the appellate court affirmed.

The Supreme Court reversed, concluding that "the prior conviction and incarceration requirement of section 666 is a sentencing factor for the trial court and not an 'element' of a section 666 'offense' that must be determined by a jury" (*Bouzas, supra,* 53 Cal.3d at p. 480.) In addition to an analysis of the case law, the court noted that "[s]ection 666 is—and has been since 1872—part of title 16 of the Penal Code, which is directed primarily to sentencing and punishment matters, to the exclusion of statutes defining substantive crimes [citation]. This supports our conclusion that the Legislature has long intended that section 666 establishes a penalty, not a substantive 'offense.' [¶] The language of section 666 affirms this view. It is structured to enhance the punishment for violation of other defined crimes and not to define an offense in the first instance. It simply refers to other substantive offenses defined elsewhere in the Penal and Vehicle Codes and provides that if a defendant has previously been convicted of and imprisoned for any of these theft-related offenses, and thereafter commits petty theft (defined in section 484), the defendant is subject to punishment enhanced over that which would apply following a 'first time' petty theft conviction. [¶] In other words, a charge under section 666 merely puts a defendant on notice . . . that if he is convicted of the substantive offense and if the prior conviction and incarceration allegation of section 666 is admitted or found true, he faces enhanced punishment at the time of sentencing. We conclude that, on its face, section 666 is a sentence-enhancing statute, not a substantive 'offense' statute." (*Bouzas, supra,* 53 Cal.3d at pp. 478-479.) Accordingly, the defendant "had a right to stipulate to the prior conviction and incarceration and thereby preclude the jury from learning of the fact of his prior conviction." (*Id*. at p. 480.)

Similarly here, appellant was on notice that if he was convicted of the substantive offense of petty theft, and if the prior conviction allegation was admitted or found true, he faced enhanced punishment at the time of sentencing. Appellant availed himself of his right to stipulate to the prior theft-related conviction allegation and admitted the two 1999

prior convictions. The stipulation constituted sufficient evidence of the prior convictions. No further proof was required.

B. *Informing the Jury of the Stipulation*

Appellant next contends the trial court erred when it informed the jury that appellant had stipulated to the prior conviction and further erred in submitting to the jury the question of whether appellant was guilty or not guilty of petty theft *with a prior theft conviction*. We agree, but conclude that the errors were not prejudicial.

In ruling on motions in limine prior to the start of trial, the court denied appellant's motion seeking to exclude all reference to his prior convictions during trial. In addition, the court allowed the People to present evidence of appellant's prior thefts from Fry's in 2005 and Albertson's in 2006 under Evidence Code section 1101, subdivision (b), as evidence of intent with respect to the charged offense. After the parties rested and before argument, the court's instructions to the jury included informing it of the prior theft conviction stipulation: "And the fact that was stipulated to in this case was that Mr. Lawson had a prior conviction for a theft related offense for which he served time in a penal institution."

Under *Bouzas*, a defendant charged with petty theft with a prior theft conviction has the right to stipulate to the prior theft-related conviction and incarceration so that the jury need only decide the issue of whether the defendant committed the essential elements of the crime of petty theft. (*Bouzas, supra*, 53 Cal.3d at pp. 478-480.) The purpose of allowing a defendant to stipulate to the prior conviction is to ensure that the trier of fact is not prejudicially influenced in determining guilt on the charged offense. (*Bouzas, supra*, 53 Cal.3d at pp. 478, 480; *People v. Jaquish* (1966) 244 Cal.App.2d 444, 450, overruled on another ground in *People v. Rivers* (1967) 66 Cal.2d 1000, 1005.) Here, appellant stipulated to the prior theft-related convictions from 1999, and thus the jury needed only to determine whether appellant committed petty theft. Neither the allegation of a prior theft-related conviction nor the stipulation to having suffered such prior theft-related conviction should have been communicated to the jury.

However, under the circumstances, the errors were harmless. The stipulated prior convictions from 1999 were not the only evidence of prior offenses. By the time the court erroneously instructed the jury that appellant had stipulated to a prior conviction, the jury had already heard testimony regarding two entirely separate and distinct prior thefts, the 2005 Fry's incident and the 2006 Albertson's incident (admitted into evidence pursuant to Evidence Code section 1101, subdivision (b); see *post*). However, the court provided no specific facts related to the stipulated conviction, and thus the jury had no reason or basis upon which to distinguish it from either the 2005 Fry's theft or the 2006 Albertson's theft. Under the circumstances, the erroneous statement to the jury was not prejudicial because there was no reasonable probability of a different result had the jury not been informed of the stipulation. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *Bouzas, supra*, 53 Cal.3d at p. 481 [court's error in informing jury of defendant's sole prior theft-related conviction was prejudicial].)

Appellant acknowledges that his trial counsel failed to object either to the court's instruction or the verdict form, but argues that any objection would have been futile in view of the court's denial of his motion to exclude all reference to appellant's prior convictions during trial. Alternatively, appellant contends that if his counsel should have objected, her failure to do so constituted ineffective assistance of counsel. In light of our conclusions that it was harmless error for the trial court to inform the jury of the stipulation and to include the prior conviction allegation on the verdict form, we need not discuss whether appellant's counsel should have objected or provided ineffective assistance.

C. *Admission of Evidence of Prior Thefts*

Appellant contends the trial court abused its discretion in admitting evidence of his 2005 theft from Fry's Electronics and his 2006 theft from Albertson's pursuant to Evidence Code section 1101, subdivision (b), to establish his intent to steal from Safeway. He argues the court should not have admitted the evidence because: (1) the Fry's evidence was insufficient to establish theft; (2) appellant's post-arrest statement in the Fry's matter was obtained in violation of his *Miranda* rights; (3) intent to steal from

Safeway was not at issue at trial; and (4) the prior theft evidence was more prejudicial than probative.

Evidence of uncharged misconduct is inadmissible if its only relevance is to show that the defendant possessed a disposition or propensity to commit the charged offense. (*People v. Gibson* (1976) 56 Cal.App.3d 119, 127; Evid. Code, § 1101, subd. (a).) However, "this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition," such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*), superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505-506; Evid. Code, § 1101, subd. (b).) "On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion. [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1147.)

The relevance of uncharged misconduct to show identity, intent, or the existence of a common design or plan is determined by the nature and degree of the similarity between such misconduct and the charged crime. "Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent." (*People v. Kipp* (1998) 18 Cal.4th 349, 369 (*Kipp*).) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*Ewoldt, supra*, 7 Cal.4th at p. 402.) "A greater degree of similarity is required in order to prove the existence of a common design or plan." (*Ibid*.) "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity." (*Id.* at p. 403.)

If the trial court finds that uncharged misconduct evidence is relevant to prove a material fact other than the defendant's criminal disposition, it must then consider whether the potential for prejudice outweighs the probative value of the evidence under Evidence Code section 352. " 'The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its

admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury.' " (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) The trial court's resolution of these issues is reviewed for abuse of discretion. (*Kipp, supra,* 18 Cal.4th at p. 371.)

" 'The principal factor affecting the probative value of the evidence of defendant's uncharged offenses is the tendency of that evidence to demonstrate the existence of' the fact for which it is being admitted . . . . [Citation.] Other factors affecting the probative value include the extent to which the source of the evidence is independent of the evidence of the charged offense, the amount of time between the uncharged acts and the charged offense and whether the evidence is 'merely cumulative regarding an issue that was not reasonably subject to dispute.' [Citations.] The primary factors affecting the prejudicial effect of uncharged acts are whether the uncharged acts resulted in criminal convictions, thus minimizing the risk the jury would be motivated to punish the defendant for the uncharged offense, and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses." (*People v. Walker* (2006) 139 Cal.App.4th 782, 806, citing *Ewoldt, supra,* 7 Cal.4th at pp. 404-406; *People v. Balcom* (1994) 7 Cal.4th 414, 427 (*Balcom*).)

1. *Sufficiency of the Evidence of Theft at Fry's*

Appellant argues that the evidence of his prior theft from Fry's in 2005 should not have been presented to the jury because the prosecution was incapable of establishing by a preponderance of the evidence that a theft had even been committed, absent a percipient witness. According to appellant, although Officer Loercher's discovery on appellant's person of packaging material for a portable DVD player and a razor knife and its packaging was "suspicious," since no one from Fry's testified that appellant failed to pay for merchandise later found in his possession, there was insufficient evidence that a theft had occurred.

"Findings of fact are reviewed under a 'substantial evidence' standard. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) The standard is deferential: 'When a trial court's factual determination is attacked on the

ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record,* there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . .' (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)" (*People v. Superior Court* (*Jones*) (1998) 18 Cal.4th 667, 681.) Substantial evidence is evidence that is "reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof." (*In re Jorge G.* (2004) 117 Cal.App.4th 931, 942.)

Contrary to appellant's assertion, the record here contains substantial evidence from which the jury could have found, by a preponderance of the evidence, that appellant committed theft at Fry's. Officer Loercher's testimony established that when he searched appellant he found the packaging for a portable DVD player stuffed up appellant's sleeve and a razor knife and the knife's packaging in one of appellant's pockets. He also searched appellant's car in Fry's parking lot and found two portable DVD players wrapped in bubble wrap. Officer Loercher arrested appellant for burglary and grand theft and placed him in the back of his patrol car, where appellant stated "he had a problem with stealing, and he indicated that he would rather steal a beer than pay a dollar for it." Officer Loercher also testified that appellant admitted the theft. The prosecutor asked him if appellant "admit[ted] to stealing from Fry's?" After the court overruled defense counsel's objection that the question was leading, Loercher answered, "Yes, he did." The evidence of theft from Fry's is sufficient to admit the evidence to establish his intent to steal from Safeway.

Appellant points out, correctly, that at the Evidence Code section 402 hearing (section 402 hearing) that took place prior to introduction of the evidence of prior thefts from Fry's and Albertson's, it was clear that appellant's admission that he stole from Fry's was made to Fry's loss prevention officer and not to Officer Loercher. Thus, appellant argues, Officer Loercher could not testify regarding that admission; any such testimony would be inadmissible hearsay. Since Loercher could not testify about that

admission, appellant continues, it was irrelevant to the trial court's decision to admit the evidence. We do not disagree, but these points do not affect our conclusion.

First, at the section 402 hearing, the prosecution provided to the court a certified copy of appellant's conviction of theft in the Fry's incident. The court ruled that if the defense objected to the admissibility of the Fry's incident on the ground that there was insufficient evidence that appellant committed theft, the prosecution would be permitted to introduce the conviction "with the defendant's signature on the plea form." The defense did not object, and appellant does not raise this issue on appeal.

Second, to the extent that appellant contends the jury had insufficient evidence from which to find by a preponderance of the evidence that appellant committed theft at Fry's, we note that Officer Loercher's testimony at trial that appellant admitted to stealing from Fry's was allowed to stand. When Officer Loercher proceeded to further explain his answer, however, the court sustained defense counsel's objection, stating, "Well, that's going farther than the question and into an area that's impermissible." The court sustained the objection only as to the unsolicited portion of the answer.

2. *Miranda Claim*

Appellant contends the evidence of the 2005 theft from Fry's should have been excluded because his admissions were obtained in violation of his *Miranda* rights. He argues that Officer Loercher's comment that "he didn't like people like appellant who brought their sons along with them to steal," and that appellant was "teaching him wrong," was the functional equivalent of interrogation because it was likely to elicit an incriminating response.

We have no occasion to reach the substance of this argument, however, because appellant waived this issue when he pleaded guilty to the Fry's theft. In *People v. Turner* (1985) 171 Cal.App.3d 116, 125, the court considered the impact of a plea of guilty on the defendant's appellate rights: "First, a guilty plea constitutes an admission of every element of the offense charged and constitutes a conclusive admission of guilt. [Citation.] It waives a trial and obviates the need for the prosecution to come forward with any evidence. [Citations.] A guilty plea thus concedes that the prosecution

possesses legally admissible evidence sufficient to prove defendant's guilt beyond a reasonable doubt. Accordingly, a plea of guilty waives any right to raise questions regarding the evidence, including its sufficiency or admissibility, and this is true whether or not the subsequent claim of evidentiary error is founded on constitutional violations. (*Ibid*.) By pleading guilty a defendant 'waive[s] any right to question how evidence had been obtained just as fully and effectively as he waive[s] any right to have his conviction reviewed on the merits.' [Citation..]" (*People v. Turner*, *supra*, 171 Cal.App.3d at pp. 125-126, fn. omitted.) On the other hand, the claims that survive a guilty plea are "those questions that go to the power of the state to try him despite his guilt. In other words, in the language of the statute, defendant can only raise 'grounds going to the legality of the proceedings.' " (*Id*. at p. 126; *People v. Halstead* (1985) 175 Cal.App.3d 772, 777-778.)

Although the situation presented in *Turner* was a direct appeal from a conviction following the defendant's guilty plea, we see no reason not to apply the same principles here. Appellant pleaded guilty to the Fry's theft, thereby waiving any right to challenge the admissibility of the evidence, including a claim that evidence was obtained in a manner that violated his *Miranda* rights. (See *People v. Turner*, *supra*, 171 Cal.App.3d at pp. 125-126.) Just as appellant could not challenge the Fry's evidence on direct appeal, he cannot mount a collateral challenge to it in this appeal.

3. *Relevance of Prior Crimes Evidence*

Next, appellant contends the evidence of prior crimes, both the Fry's theft and the Albertson's theft, should have been excluded because intent to steal from Safeway was not in dispute. This is so, appellant explains, because his defense to the charge had nothing to do with intent. Rather, the defense was that no taking occurred; Mr. Canas paid for the merchandise before appellant took it out of the store. We reject the argument for several reasons.

First, appellant's characterization of his defense notwithstanding, the prosecutor's theory of the case was that appellant went into Safeway, put several items into his cart, and intentionally pushed the cart out the exit without paying for the items.

Second, by pleading not guilty, appellant put in dispute all the elements of the charged offense, including intent. (*People v. Catlin* (2001) 26 Cal.4th 81, 146; *Balcom, supra,* 7 Cal.4th at p. 422.) Evidence that appellant committed uncharged similar offenses would have some relevance regarding his intent in the present case. (*People v. Steele* (2002) 27 Cal.4th 1230, 1243; *People v. Balcom, supra,* 7 Cal.4th at p. 422.) " 'We have long recognized "that if a person acts similarly in similar situations, he probably harbors the same intent in each instance" [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution.' " (*People v. Gallego* (1990) 52 Cal.3d 115, 171.)

Here, the prosecution offered the evidence of the prior offenses at Fry's and Albertson's, and the trial court permitted its introduction, as circumstantial evidence of appellant's intent at the time of the Safeway incident, i.e., for the limited purpose of establishing that, when appellant walked out of Safeway with the items in the cart, he intended to steal them. If appellant intended to permanently deprive Fry's and Albertson's of their merchandise, the jury reasonably could infer that he harbored the same intent at Safeway.

"Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' [Citation.] For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it." (*Ewoldt, supra,* 7 Cal.4th at p. 394, fn. 2.)

That is this case. Regardless of appellant's defense that Mr. Canas paid for the groceries, appellant himself left Safeway without paying for the items in the cart.

Appellant's prior offenses were admissible to demonstrate that appellant did not inadvertently neglect to pay for the merchandise and did not believe that someone else paid for it, but, rather, that he harbored the intent to steal it. Whether or not Mr. Canas actually paid for the items was relevant to the element of a taking (a theory the jury rejected). The prosecution was required to prove both a taking and intent. (See *People v. Roldan* (2005) 35 Cal.4th 646, 706-707 [the prosecution is required to prove each element of the case], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

4. *Potential Prejudice of Prior Crimes Evidence*

Appellant contends that, even if the evidence was properly admitted as probative on the issue of intent to steal, the court should have excluded the evidence pursuant to Evidence Code section 352 because of the substantial danger of undue prejudice. Appellant argues that his theft of beer and snacks from Albertson's, combined with his statement during the Fry's incident that he would rather steal beer than pay a dollar for it, resulted in a strong likelihood that the jury would convict him because of a propensity for stealing.

The prejudice that Evidence Code section 352 guards against is not the prejudice to a defense that flows from relevant, highly probative evidence, but rather that which results from evidence that has little effect on the issues but yet tends "to evoke an emotional bias against the defendant as an individual." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) In *Ewoldt*, *supra*, 7 Cal.4th at pp. 404-406, the court explained that the primary factors to consider in assessing the prejudicial effect of uncharged acts are whether the uncharged acts resulted in criminal convictions, thereby reducing the risk that the jury might seek to punish the defendant for the uncharged acts, and whether evidence of the uncharged acts is stronger or more inflammatory than the evidence of the charged offense.

Here, the evidence of the two prior incidents of shoplifting, although damaging to appellant's defense because of their similarity to the current offense and relevance to the issue of intent, was not overly prejudicial within the meaning of Evidence Code

section 352. During closing argument, defense counsel informed the jury that appellant "admitted in both [prior] cases to stealing" and that he "[t]ook responsibility . . . for what he had done." In addition, the evidence of the prior shoplifting incidents was no more inflammatory than the evidence of the instant offense and was not of a type that would tend to evoke an emotional bias against appellant as a person. We discern no abuse of discretion by the trial court in admitting the evidence.

D. *Prosecutorial Misconduct*

Appellant contends that the prosecutor engaged in prejudicial misconduct during closing argument by encouraging the jury to use evidence for an improper purpose and by arguing facts that were not in evidence.

1. *Legal Principles*

A prosecutor has wide latitude to discuss and draw inferences from the evidence at trial and to respond to defense counsel's arguments. (*People v. Bemore* (2000) 22 Cal.4th 809, 846; *People v. Lucas* (1995) 12 Cal.4th 415, 473.) " 'A prosecutor's conduct violates the federal Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." [Citation.]' " (*People v. Hinton* (2006) 37 Cal.4th 839, 862-863; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on other grounds in *People v. Doolin, supra,* 45 Cal.4th 421, fn. 22.) "Whether the inferences the prosecutor draws are reasonable is for the jury to decide. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) "When the issue 'focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-

of remarks in an objectionable fashion.' [Citations.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 244.)

In order to preserve an appellate claim of prosecutorial misconduct, a defendant must make a timely objection at trial and request an admonition; otherwise, a claim is reviewable only if an admonition would not have cured the harm caused by the misconduct. (*People v. Farnam* (2002) 28 Cal.4th 107, 167.) A defendant's conviction will not be reversed for prosecutorial misconduct unless it is reasonably probable that the defendant would have achieved a more favorable result without the misconduct. (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

2. *Appellant's Statement*

Appellant argues that the prosecutor committed misconduct "by first emphasizing during closing argument that appellant had previously admitted his propensity to steal beer rather than pay for it, and by thereafter drawing attention to this statement again during rebuttal and by maintaining that consistent with this statement, appellant failed to pay a dollar for beer in 2006 (at Albertson's) and on November 4, 2007, during his alleged commission of the charged crime at Safeway."

The relevant portion of the prosecutor's closing argument is as follows:

"[Prosecutor]: . . . And you heard Officer Loercher testify about the defendant's motive in this case. And the Judge read to you that motive isn't an element of the crime.

"[Defense Counsel]: I would object. It wasn't the limited purpose that Loercher's testimony was admitted for –

"The Court: It was admitted for the purpose of intent, counsel.

"[Prosecutor]: I understand, your Honor, but this is argument.

"The Court: I know. But it's a well-taken objection.

"[Prosecutor]: Okay. [¶] Well, you heard Officer Loercher testify what the defendant said to him in 2005 two years before this incident, 'I have a problem with stealing. Instead of paying a dollar for a beer, I would rather steal it.' [¶] That prior act goes toward the defendant's intent here. . . . [¶] He would rather pay—he would rather not pay a single dollar for a beer. He would rather steal it."

"[Defense Counsel]: Again, same objection. It's for the limited purpose of intent not motive.

"The Court: That's overruled."

The relevant portion of the prosecutor's rebuttal argument was:

Prosecutor: "And finally, defense counsel didn't really mention the priors, which are here to show intent, why the defendant would go into that store, why the defendant would steal, why he would keep things, why he intended to do this. [¶] And again, you can look at the jury instruction 375. It says consider the similarity. [¶] Now, in 2005, you heard Officer Loercher testify of a theft that day, that he found stolen items on the defendant. [¶] And you heard Officer Loercher say the defendant said instead of paying even a dollar for beer, he would rather steal it, which is exactly what he did in 2006. [¶] I read you a statement from Giovanni Baldizon where Donald Paul Lawson took two bags out of his right jacket pocket. You can consider the similarities. [¶] Just like here when he walked in with two bags, he went right to the beer aisle and made one selection of an 18-pack of Budweiser just like he did here. [¶] Then he went and picked up Cheetos, Doritos, Bugles. Then he went to the deli aisle just like he did here. Then he exited the doors. He failed to pay, and he passed all the registers. Exactly like he did here. [¶] 2005, he said he would refuse to pay even a dollar for beer. 2006, he didn't pay a dollar for his beer. And on November 4th, 2007, again, he didn't pay a dollar for his beer."

We hold that appellant forfeited any claim of prosecutorial misconduct based on these statements by failing to object. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) As can be seen from the quoted portions of the transcript, the only objections appellant interposed were that the prosecutor was improperly using appellant's statement as evidence of motive. Had defense counsel drawn to the court's attention that the prosecutor was improperly using the prior statement as propensity evidence, the court could have reminded the jury that the evidence was relevant only on the issue of intent. We believe such an admonition would have cured any potential harm.

Appellant attempts to surmount the problem of forfeiture by contending that he did properly object "on grounds that it [the prior statement] was admitted for a limited purpose." Further, appellant contends that, because his objection was overruled, he had no further obligation to object or request an admonition. The argument has no merit. Appellant did not object on the ground he urges here, i.e., propensity. Nor do we believe that such an objection would have been futile since the evidence was admitted for the limited purpose of intent.

However, to forestall a claim of ineffective assistance of counsel, we will consider the merits of appellant's contention. The statement was admitted as part of the evidence of appellant's prior theft from Fry's Electronics for the purpose of establishing his intent in the instant case. From the evidence that appellant told the arresting officer at Fry's in 2005 that he would rather steal beer than pay for it, the evidence that he stole beer from Albertson's in 2006, and the evidence that he "flashed" a $100 bill when he was detained by the security guard at Safeway, the prosecutor reasonably could argue that appellant intended to steal the beer in this case. A prosecutor is "entitled to comment on the state of the evidence and the absence of conflicting evidence [citations] and to draw permissible inferences from the record [citation]." (*People v. Coo*k (2007) 40 Cal.4th 1334, 1359.) The prosecutor's remark during her closing argument was proper comment on the evidence.

The prosecutor's comments in her rebuttal are a closer call. She argued that, in 2005 at Fry's, appellant said that he would rather steal beer than pay a dollar for it; in 2006 at Albertson's, he stole beer rather than pay for it; and again in 2007, the instant case, he stole beer rather than pay for it. In making this argument, the prosecutor cited the court's instruction to the jury that "[i]n evaluating this evidence [the uncharged offenses evidence], consider the similarity or lack of similarity between the uncharged offense and/or act and the charged offenses." But even, assuming for the sake of argument that the prosecutor's statements amounted to using appellant's statement as evidence of a propensity to commit theft, the misconduct was not prejudicial. The trial court sustained a number of defense counsel's objections during the prosecutor's closing

argument, and admonished the jury on several points, including that the arguments of counsel were not evidence and that the jury was the sole judge of the evidence, that the jury was required to follow the law as given by the court, and that the defense had no burden of proof. The court also instructed the jury: "Do not consider this evidence [the uncharged offenses evidence] for any other purpose except for the limited purpose of intent. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit a crime." We presume the jury followed the instructions. Any prejudice resulting from the prosecutor's use of appellant's prior statement was thus cured, and it is not likely that appellant would have received a more favorable outcome had the prosecutor not made such comments. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.)

2. *The Surveillance Recording*

Appellant also complains that the prosecutor committed misconduct when she argued in rebuttal: "If there was a DVD of this incident, don't you think I would have sat back, put my feet up, and just pushed play?" The trial court overruled defense counsel's objection. The prosecutor's argument was in response to an argument by defense counsel in which she pointed out to the jury that the prosecution had not introduced a surveillance videotape of the Safeway theft: "You've heard the evidence. You've seen the evidence. You've seen what evidence wasn't presented. [¶] No video. . . . [¶] That's like keeping the DNA out of a murder case when it's the only bit of evidence linking someone to a murder." The trial court overruled the prosecutor's objection, ruling that defense counsel's comments were fair argument and that the jury knew it was merely argument. In turn, the prosecutor's remarks were fair argument on rebuttal.

Appellant contends that the prosecutor compounded the problem by impermissibly shifting the burden of proof to appellant by suggesting that he should have introduced the video if it was exculpatory. The trial court sustained defense counsel's objection, advising the jury that "[t]he burden is not on the defense to prove anything in this case." Although appellant acknowledges that the trial court sustained the objection, he argues

that the prosecutor "nevertheless achieved her apparent objective of establishing that the DVD of this incident was no longer available for viewing."

We find no deceptive or reprehensible attempt to mislead the jury. (See *People v. Hinton, supra,* 37 Cal.4th at pp. 862-863.) Just as defense counsel's comments about the prosecution's failure to introduce a videotape of the incident were fair comment on the evidence, so, too, were the prosecutor's remarks on rebuttal. No evidence was presented to explain why the surveillance recording was not introduced at trial, and thus the arguments on the subject were simply arguments and fair comment on the evidence.

However, even if the prosecutor's comments about the absence of a surveillance tape amounted to asserting a fact not in evidence, to wit, that no recording was available, the harm from such an assertion, if any, would be quite minor and curable by proper instructions. Any potential prejudice was cured here by the court's instructions to the jury that they must decide the facts using only the evidence presented at trial, that nothing the attorneys said was evidence, including their arguments, and that they must follow the law as given to them by the court. We presume that the jury followed these instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436; *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.)

Moreover, the prosecutor's comments about the absence of a surveillance recording had no probative value on any material fact at issue, were not inflammatory, and the court did not endorse the comments in any way. The comments did not imply that the recording would implicate appellant. Rather, the comments were the prosecutor's response to defense counsel's argument that the jury should be concerned about why the prosecutor did not introduce a recording. We believe the jury understood the comments as argument and did not treat them as evidence in reaching their verdict.

E. *Cumulative Error*

Finally, appellant argues that the cumulative effect of the alleged errors requires reversal. Because we have concluded that none of the individual arguments has merit, we necessarily find no cumulative prejudicial impact.

IV. DISPOSITION

The judgment is affirmed.

_____
Haerle, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.